UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CHEVRON CORPORATION,

Plaintiff,

-against-

11 Civ. 0691 (LAK)

STEVEN DONZIGER, et al.,

Defendants.

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MEMORANDUM AND ORDER

LEWIS A. KAPLAN, *District Judge.*

Steven Donziger now demands discovery from one of the Special Masters who was appointed to preside over and supervise some aspects of discovery in this case. The purported basis for his demands is their ostensible relevance to the Court's review of the Clerk's taxation of costs against Donziger.

The Court today disposes of Donziger's motion for review of the Clerk's action in a separate opinion. This order disposes of Donziger's ostensibly related discovery demands, which are without merit and are, in part, moot.

The Demands

Long after the Clerk taxed costs and long after Donziger's motion for review of the Clerk's taxation of costs was fully submitted, Donziger submitted two letters, dated January 8 and 12, 2018, requesting discovery with respect to certain aspects of the costs taxed in respect of the special masters appointed to supervise portions of the discovery in this case. DI 1948, DI 1951.

These letters make two demands:

a. Donziger first asks that one of the Special Masters, Max Gitter, Esq., include in what Donziger calls the "Billing Submission" "records, native time-stamped computer data, and other proof sufficient to indicate when exactly each time entry was recorded and entered into the relevant time-keeping system." DI 1948, at 1. He defines the term "the Billing Submission" to mean

billing data that "Mr. Gitter has committed to providing . . . by January 12, 2018." *Id.*; *see also* DI 1951, at 1.

b. He demands also that Special Master Gitter and the Cleary Gottlieb firm[1] disclose the full amount of any and all payments received from Chevron for services rendered in two Section 1782 matters in which Mr. Gitter served also as a special master and which were substantially concluded years ago, prior to the commencement of this action.

The First Demand

The first demand rests on the premise that the Court should not tax against Donziger special master costs attributable to Special Master Gitter's fees to which the Billing Submission relates if the time records underlying those fees were not kept contemporaneously. There are two very short answers to this demand.

1. The costs that the Clerk taxed against Donziger, which are the subject of the motion decided today, were for services of the Special Masters rendered before the 2013 trial.[2] *The Billing Submission, as Donziger defines it, refers to something else entirely.* Specifically, this Court on November 9, 2017, requested a report and recommendation from the Special Masters relating to the allocation of special master costs as between Chevron and the defendants (the "2017 R&R"). DI 1939, ¶ 3. That order requested also that the Special Masters submit their bills for the preparation of the 2017 R&R together with the R&R. *Id.* The Special Masters then requested and received an extension of time until January 12, 2018 for the submission *of those bills.*

Donziger claims he should have the data concerning the contemporaneity of the time records underlying the bills for preparation of the 2017 R&R because they bear on the appropriateness of taxing him with costs for services rendered in 2013. But that simply makes no sense. And no one thus far has sought to impose all or any part of the cost of preparing the 2017 R&R on Donziger.

2. But perhaps Donziger, despite the specificity of his request for materials relating to the cost of the 2017 R&R, really meant to ask instead for computer records, etc. that might bear on the contemporaneity of Mr. Gitter's time entries during the period in 2013 in respect

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1 Mr. Gitter is a retired partner of and special counsel to Cleary.

2 The time records with respect to those services were furnished to Donziger partly when Chevron noticed the taxation of costs before the Clerk (DI 1918-8, at ECF pp. 3-11) (time records of Special Master Katz) and partly on or about November 21, 2017 (DI 1949 & Exs. 1-3; *see also* DI 1939 ¶ 1) (time records of Mr. Gitter and the Cleary firm).

of which the Clerk taxed special master costs against Donziger.[3]

Any such request would be moot. Special Master Gitter has filed a submission that lays to rest any concern about the contemporaneity of his time records, regardless of the merits of Donziger's implicit point as a matter of law.[4] DI 1957.

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[3] A subsequent letter raised that issue. DI 1951 ¶ 1.

[4] Even if this request were not moot, it would lack any merit.

Donziger's letters cite no legal authority for the proposition that courts should not tax as costs fees of special masters previously advanced by the ultimately prevailing party unless those charges are supported by contemporaneous time records. To be sure, the Court applications for attorney fee awards normally should be so supported. *NYS Ass'n for Retarded Children, Inc. v. Carey,* 711 F.2d 1136, 1147-48, 1154 (2d Cir. 1983). But Donziger long since waived any objection on that ground. And even if he had not, this case is not governed by *Carey*. Indeed, it arguably would be unfair to Chevron, which paid the special masters' fees several years ago – and which, as the prevailing party here, presumptively is entitled to tax them as costs – retrospectively to extend *Carey* to situations like this

Donziger's attempt to raise this issue is untimely. When Chevron noticed the taxation of costs, it sought to recover Special Master Gitter's fees, which it had advanced. It submitted the invoice it paid, which reflected the number of hours billed but gave no time detail. DI 1918-8, at ECF p. 2. Neither Donziger's motion to hold the taxation of costs in abeyance, his objections to the Clerk, nor his application to the Court to review the Clerk's action raised any question about the absence of detailed or contemporaneous time records. DI 1919, DI 1925, DI 1931. Further, when the Court requested that Special Master Gitter and Cleary Gottlieb submit their time records, it required Donziger to file, on or before December 4, 2017, any objections to the reasonableness of the hours for which Chevron sought to tax special master costs. DI 1939, ¶ 1. Donziger filed no timely objections. The Court then ruled on December 6, 2017 that the special master fees and expenses that the Court had taxed against Donziger were reasonable. DI 1940. These claims about the contemporaneity of Mr. Gitter's time records thus were never raised before the Court ruled on the propriety of the rates and hours charged. They first were raised in reaction to the Court's ruling. As former Chief Judge and Attorney General Mukasey aptly wrote years ago in an oft-cited case, a litigant "is not supposed to treat the court's initial decision as the opening of a dialogue in which that party may then . . . advance new theories or adduce new evidence in response to the court's rulings." *de los Santos v. Fingerson,* 97 Civ. 3972(MBM), 1998 WL 788781, at *1 (S.D.N.Y. Nov. 12, 1998). Donziger long since waived any otherwise legitimate objection months.

Nor would *Carey* control here even if the point had not been waived.

The Second Demand

The second demand warrants a bit of background.

Background

The filing of this action was preceded by two Section 1782 proceedings brought by Chevron and two Chevron attorneys, the latter of whom were targets of an attempt by Donziger to have them criminally prosecuted in Ecuador. In addition to document production, there were a few depositions in the *Berlinger* proceeding and a very extended deposition of Donziger in the *Donziger* matter. In view of the apparent imminence of impending events in Ecuador and the likely presence of difficult journalist and other privilege issues, the Court appointed Mr. Gitter, a distinguished and very experienced litigator, as special master in each, principally to supervise the depositions.[5]

In view of the present context, a word or two is warranted also about the compensation of the special master. In the *Berlinger* matter, as Berlinger was not a contending party in the decades-old dispute between Chevron and Donziger's Ecuadorian clients, the Court directed that Chevron bear the costs of the special master, at least in the first instance. *In re Application of Chevron Corp.*, 736 F. Supp.2d 773, 785 (S.D.N.Y. 2010). In *Donziger*, it directed that the fees and disbursements of the special master were to be borne equally by Chevron, Donziger, and the two

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Carey and its progeny apply to applications by attorneys for fee awards under fee shifting statutes or on the common benefit fund theory. This is neither in form nor substance such an application. It is review of a Clerk's taxation of costs. That arguably would have made a considerable difference, at least in this case, had Mr. Gitter not kept contemporaneous time records, as he did.

It perhaps would be desirable to limit the taxation of costs attributable to the compensation of attorney-special masters to that compensation attributable to work for which the attorney-special master kept contemporaneous time records. But that is not what *Carey* held. And it is questionable whether any such a rule properly could be made retroactive. Indeed, *Carey* recognized that the imposition of a new contemporaneous time record requirement *in that case* would have been unfair and thus made its ruling with respect to attorneys fee applications prospective only. *Carey,* 711 F.2d at 1147-48. In consequence, it arguably would be unjust to deny Chevron the ability to tax as costs special master fees that it advanced – in part because Donziger defied a court order to pay his share – in the absence of any clear rule to that effect. But there is no need to decide that here in view of the facts that (a) Donziger has waived the point, and (b) Mr. Gitter maintained and produced contemporaneous time records.

5 It is noteworthy that no one involved in either case ever filed an appeal from or objection to any of his actions or rulings, as would have been permitted by Fed. R. Civ. P. 53(f).

Chevron lawyers, subject to later reallocation. No. 10-mc-0002 (LAK) DI 86, at 8-9. And it is worth noting that Donziger argued on appeal that the interim fee sharing provision should be altered on the ground that it was inappropriate to "order[] Donziger, whose financial means cannot be meaningfully compared to Chevron's, to share the costs of his own deposition, and to aid Chevron in the litigation against his clients." Brief for Respondent-Appellant Steven R. Donziger, *Lago Agrio Plaintiffs v. Chevron Corp.,* No. 10-4341-cv(L), DI 149, at 52-53. While the Circuit rejected all his other contentions, the substance of which are not relevant here, the Circuit agreed on that point. It held that Chevron and the two Chevron attorneys should pay the entire cost of the special master on an interim basis. *Lago Agrio Plaintiffs,* 409 Fed. Appx. 393, 395 (2d Cir. 2010).

Accordingly, Donziger knew even before this case was commenced, and certainly well before Mr. Gitter was named as one of the special masters here, that Chevron had paid or was paying his compensation. He knew also that the fees were or would be substantial, not least because Mr. Gitter presided over Donziger's deposition in the *Donziger* 1782 proceeding, which lasted approximately fifteen days[6] and generated in excess of 4,200 pages of transcript.[7]

Merits

Against that background, we turn to the merits of Donziger's argument that the compensation paid to Special Master Gitter *in the two 1782 proceedings* should be disclosed here because it somehow bears on whether the cost of Mr. Gitter's services *in this later case* should be taxed in favor of Chevron as the prevailing party. His argument is as follows:

- Special Master Gitter "exhibited rank bias in favor of Chevron and against" Donziger. DI 1948, at 2 (citing DI 1941, at 2, 7-9, 10).

- "Mr. Gitter repeatedly indicated that he was in secret *ex parte* communications with Chevron and its counsel, and that Chevron counsel was advising Mr. Gitter of its strategic and tactical thinking such that Mr. Gitter could assist with it." DI 1948, at 2 (citing DI 1941, at 8; 1/19/2011 Dep. Tr. at 3433-34).

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6 *Chevron Corp. v. Donziger,* No. 11-cv-0691 (LAK), 2013 WL 3270339, at *2 (S.D.N.Y. June 27, 2013); *see also* DI 1270, at 2 (Donziger motion for protective order stating that he had sat for one day of deposition in this case and, including the 1782 proceeding, a total of 17 days of deposition).

7 *See* Gomez Declaration [DI 287] Ex. 16 [DI 287-16] at 4,233. (This transcript is label Day 14 of the deposition. The parties appear to agree that it lasted for another day or two.).

- "If in fact Messrs. Gitter and Ormond[8] were paid significant sums by Chevron prior to the commencement of their work in the RICO matter . . . then this would obviously serve as powerful corroborating evidence for my objections." DI 1948, at 2.

But the argument falls apart upon inspection.

As an initial matter, Special Master Gitter is a retired partner and at all relevant times has been a senior counsel at Cleary Gottlieb, a leading law firm.[9] The first of the orders of appointment, that in *Berlinger*, fixed the Special Master's compensation at his "customary hourly rates." No. 10-mc-0001 (LAK) DI 62. And while the order of appointment in the second, the *Donziger* 1782, did not refer specifically to hourly rates, Special Master Gitter in that matter presided over a deposition that lasted approximately fifteen days[10] and generated in excess of 4,200 pages of transcript.[11] Thus, it has been abundantly clear to Donziger since even before this action was filed that Special Master Gitter and Cleary Gottlieb "were paid significant sums by Chevron prior to the commencement of their work in th[is] RICO matter." Even if that fact were somehow material here, the precise amount is not because the Court assumes – as Donziger seeks to establish – that it was "significant." And the (assumed) fact that it was "significant" also is immaterial.

Donziger claims that Special Master Gitter exhibited "rank bias" and was in "secret *ex parte* communication" with Chevron. He contends further that the (assumed) fact that the special master received "significant" compensation for his work in the 1782 proceedings somehow "corroborate[s]" Donziger's claims. But that is a *non sequitur*. Both of Donziger's claims rest entirely the transcript of Donziger's depostion in the *Donziger* 1782 case.[12] Assuming that his claims

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8 Mr. Ormond then was a Cleary Gottlieb associate whom the Court designated to assist the two special masters in *Chevron v. Donziger*, 11-cv-0691 (LAK). He was not so designated in the *Berlinger* or *Donziger* 1782 proceedings. *fix* - there was authority to use associate

9 No. 11-cv-0691 (LAK) DI 897, at ECF pp. 5-6.

10 *Chevron Corp. v. Donziger,* No. 11-cv-0691 (LAK), 2013 WL 3270339, at *2 (S.D.N.Y. June 27, 2013); *see also* DI 1270, at 2 (Donziger motion for protective order stating that he had sat for one day of deposition in this case and, including the 1782 proceeding, a total of 17 days of deposition).

11 *See* Gomez Declaration [DI 287] Ex. 16 [DI 287-16] at 4,233. (This transcript is labeled Day 14 of the deposition. The parties appear to agree that it lasted for another day or two.)

12 Donziger's January 8 letter (DI 1948) cites for the proposition that Special Master Gitter exhibited "rank bias" only an earlier Donziger letter, DI 1941. That earlier letter, to the

of bias and "secret *ex parte* communication" were relevant at all to the taxation of costs in this case – and they are not – those claims either are supported by that deposition transcript or they are not. The special master's compensation could not "corroborate" whatever the transcript reveals or fails to reveal. In other words, if Donziger's claims are not borne out by the transcript, then the special master's compensation could not supply what is not there to begin with.

Next, Donziger's claims are not supported by the deposition transcript. They are unfounded assertions that Donziger has made intermittently for years now, and they all have been

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extent it cited anything at all in support of the biased behavior allegation, cited only DI 943, DI 999, and DI 1111 Exs. C, D. DI 1941, at 7. DI 943, a letter from Donziger's counsel objecting to the appointment of Mr. Gitter as special master in this case, in turn referred to earlier pleadings in this case, notably to an earlier Donziger motion to recuse the undersigned that this Court denied, *Chevron Corp.*, 783 F. Supp.2d, 713, and with respect to which the Circuit denied his petition for mandamus. DI 943, at 2-3. Donziger there argued that Mr. Gitter had exhibited bias *during the deposition in the* Donziger *1782 proceeding*. Finally, DI 1111 was a motion by Donziger's then counsel to withdraw. Exhibits C and D to that motion, upon which Donziger purportedly relies, have nothing whatever to do with this subject.

For the proposition that Special Master Gitter "was in secret *ex parte* communications with Chevron and its counsel," the January 8 letter cites the same earlier letter (i.e., DI 1941, at 8) and a January 19, 2011 deposition transcript. DI 1948, at 2. The cited deposition transcript is from the Donziger 1782 deposition, which predated this action. The earlier letter also quotes exactly the same passage from the same deposition. DI 1941, at 8.

rejected.[13] Unlike fine wines, they have not improved with age.[14]

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[13] The initial assertion was that Mr. Gitter had been hostile to Donziger during the deposition in the 1782 proceeding. It came in a motion to reassign this case to Judge Rakoff – whom Donziger notably had accused of corruption years before, *Chevron Corp.*, 783 F. Supp. at 720 (citing DI 179 Ex. 2 (outtake from the film *Crude*)) – on the ground that this case was related to a case over which Judge Rakoff had presided years before. DI 160, at 13-14 & i-vii; DI 161, Ex. K. This Court did not comment on the assertion in denying Donziger's motion. *Chevron Corp.*, 2011 WL 979609 (S.D.N.Y. Mar. 11, 2011). Soon thereafter, however, Donziger moved to recuse the undersigned, making substantially the same arguments on much the same basis as had been advanced on the motion to reassign the case to Judge Rakoff. DI 285, at 10-15. The only perhaps new argument was the allegation regarding secret *ex parte* communications.

Chevron responded to the recusal motion and to Donziger's contentions. DI 297, at 32-35. After careful consideration and review of the deposition record, this Court denied the recusal motion. *Chevron Corp.*, 783 F. Supp.2d 713. In doing so, it ruled also that all of Donziger's "allegations are unfounded," "substantially for the reasons discussed in Chevron's memorandum." *Id.* at 730 (citing DI 297, at 32-35).

[14] Nothing better demonstrates irresponsible nature of Donziger's claims than the "secret *ex parte* communications" allegation – which Donziger says is the best illustration of the Special Master's alleged bias. *See* DI 285, at 12-13.

Donziger's January 8 letter states in relevant part:

> "Mr. Gitter also repeatedly indicated that he was in secret *ex parte* communication with Chevron and its counsel, and that Chevron counsel was advising Mr. Gitter of its strategic and tactical thinking such that Mr. Gitter could assist with it. *See, e.g., id.* at 8; 1/19/2011 Dep. Tr. at 3333-34 (GITTER: 'I think you will find . . . . there will be a filing . . . at some point that will show you the relevance that I was satisfied about . . . Mr. Mastro, am I correct about that?' MASTRO: 'You are absolutely correct. But it won't come as a surprise to [Donziger's counsel] that I'm not going to discuss it with them today.'". DI 1948, at 2

But, as Chevron previously demonstrated, Donziger omits the portion of the transcript that demonstrates unequivocally that there was no inappropriate *ex parte* communication:

> "all opposing counsel—including the LAPs' [and Donziger's] counsel—consented to the brief meeting before the deposition excerpts that are the linchpin of the LAP Representatives' belated attack. Ex. 20 at 3220:3-3221:4; see also id. at 2803:3-12, 3917:10-3919:9, 3944:30-3912:12 ('with the consent of the other side'). As Donziger's counsel was about to object to a question regarding defendants' funding

And finally, none of this would matter here *even if* Donziger had not waived the point long ago, which he did; *even if* there were a question as to whether Mr. Gitter received "significant" compensation for his work in the 1782 proceedings, which there is not; *even if* that somehow were relevant to Donziger's claim that Mr. Gitter's actions in the Donziger 1782 deposition exhibited bias or collusion, which it is not; *even if* this Court had not already rejected those claims well before trial, which it did; and *even if* the transcript of the Donziger 1782 deposition supported Donziger's assertions, which it does not. The Court is concerned now with the taxation of costs in *this case.* The Court previously ruled that the hourly rates were appropriate and the time expended reasonable, given the exceptional nature of the demands of the special masters and their exceptional service. As the memorandum opinion filed today has ruled, Chevron, as the prevailing party, is presumptively entitled to recover its costs, including those special master fees and expenses advanced by it in this case. Mr. Gitter's compensation and actions in two previous cases have nothing material to do with

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agreement and Patton Boggs LLP, the Special Master sought counsel's consent for an *ex parte* offer of proof by Chevron's counsel stating:

> THE SPECIAL MASTER: I assume that Mr. Mastro will not make an offer of proof except on an ex parte basis as we had once before. Will you consent to my asking him outside the room ex parte what his offer of proof is going to this kind of detail in this document?
>
> MR. [BRUCE] KAPLAN [Donziger's counsel]: Yes.
>
> THE SPECIAL MASTER: Mr. Abady?
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> MR. ABADY: Yes.
> (The Special Master and Mr. Mastro depart the room.)

Id. at 3220:11-3221:25. After receiving this offer of proof, Special Master Gitter informed defendants' counsel that the relevance of this line of questioning would become apparent from Chevron's counsel's subsequent questioning; 'as I believe you will find out in the not that distant future, there was real relevance to this.' Ex. 20 at 3234:13-3235:11. That is exactly what happened. Id. at 3235:20-3240:20. After establishing the scope of the relationship with Burford (the questions that prompted the *ex parte* communication), Chevron's counsel then, in reliance on that foundation, asked about the LAPs' communications with Burford regarding Cabrera, Calmbacher, and other issues of direct relevance to the 1782 discovery. Ex. 20 at 3236:5-8; 3237:17-22; 3238:19-24. This is entirely permissible. *See In re Vioxx rods. Liab. Litig.,* 501 F. Supp. 2d 789 (E.D. La. 2007)." DI 297, at 33-34.

any of this.[15]

Conclusion

Donziger's so-called supplemental letter motions (DI 1948, DI 1951) are denied in all respects.

SO ORDERED.

Dated: February 28, 2018

Lewis A. Kaplan
United States District Judge

15 Moreover, it perhaps is worthy of note that Donziger, though he objected to Mr. Gitter's appointment in this case, never moved to recuse or remove him and formally appealed from or objected to only five of his many rulings in the action. DI 1252; DI 1275; DI 1301 (ruling on three objections regarding rulings made in depositions).